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INTERNATIONAL ARBITRATION MADE ATTRACTIVE.

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In the inauguration of any tribunal of such high character and wide jurisdiction as that constituted by the Peace Conference at The Hague, July 29th, 1899, questions of convenience of administration, as well as questions of procedure, and possibly other questions of like import, were sure to arise upon the threshold of its usefulness,—questions which could not have been foreseen, or, if foreseen, could not have been wisely decided by the Conference itself; but it is very remarkable how few such questions have arisen, and how easily they can be settled in entire accordance with the conclusions announced by the Conference. The five eminent jurists who were selected to hear and decide the first controversy at The Hague,—that between the United States and Mexico known as the "Pious Fund" Case—declared that they considered themselves "under the moral obligation of submitting to the kind consideration of the interested governments some points which may be regulated easily by subsequent agreements between the states in litigation." They said that they were "deeply impressed with the feeling of their duty to contribute to the better interpretation and carrying out of the Hague Conven-

tion for the Pacific Settlement of International Disputes, and to consolidate the regular course of such future arbitral tribunals as may be constituted, with the view of re-establishing good understanding between nations. It is desirable," they added, "that jurisprudence be established in the domain of international arbitration, and it is to be hoped that each future arbitral tribunal will add a stone to the edifice whose foundations were laid by the Hague Convention of 1899. Such are the motives of our action." And such are the motives, and the only motives, which have dictated the present contribution to the subject.

The more carefully the Convention in question is considered, the greater will be the recognition of the wisdom of its provisions in almost all respects; and in no respect did the members of the Conference show greater wisdom than in making the provisions of the Convention so elastic, that the parties desiring to invoke the good offices of the tribunal it established are left absolute masters of the terms and conditions of such submission. The declaration of the Conference was in these broad and generous words:

"International arbitration has for its object the determination of controversies between states by judges of their own choice, upon the basis of respect for law. In questions of a judicial character, arbitration is recognized by the Signatory Powers as the most efficacious and, at the same time, the most equitable method of deciding controversies which have not been settled by diplomatic methods. With the object of facilitating an immediate recourse to arbitration for international differences which could not be settled by diplomatic methods, the Signatory Powers undertake to organize A Permanent Court of Arbitration, accessible at all times. Within three months following the ratification of the present act, each Signatory Power shall select not more than four persons, of recognized competence in questions of international law, enjoying the highest moral reputation, and disposed to accept the duties of arbitrators. . . . The members of the court shall be appointed for a term of six years, and their appointment may be renewed. The court of arbitration shall ordinarily sit at The Hague."

The first observation which should be made upon these provisions concerns the last of them, which has heretofore, perhaps, escaped notice; and that is that the tribunal need not necessarily sit at The Hague, but may, by the agreement of the parties and by the consent of the selected judges, sit at whatever place may be most satisfactory. It might well happen that two South-American states might be deterred from taking their controversy to the

tribunal if it must necessarily sit at The Hague; while, if they could select members of the tribunal who would agree to sit at the city of Washington, or at the capital of some disinterested South-American republic, the temptation to invoke the good offices of the tribunal would be far greater; and it requires but little reflection to appreciate the very great wisdom of this provision.

Another provision of even greater value is that authorizing the appointment of a great number of distinguished international jurists, named by twenty-six different countries, from whom the parties in controversy may select judges satisfactory to them. Innumerable methods of thus selecting them will at once occur to any person reflecting upon the subject. An equal number of these judges—one, two or three as desired—may be selected by each party, and the judges thus selected may themselves appoint an additional judge as umpire; or the selection of the umpire may be referred to some sovereign or president; or the judges may be selected by a process of exclusion, as by agreeing upon an uneven number of judges and allowing each party to strike from the list an equal number, leaving the judges remaining as the judges to hear and decide the controversy. Indeed, with so large a number of jurists meeting the requirements of the Convention, there can be little difficulty for any countries really desirous of availing themselves of the opportunity the tribunal offers in selecting the number desired of learned and impartial jurisconsults.

The earnest desire of the members of the Conference to encourage resort to the tribunal was further illustrated by their allowing the parties to any proposed arbitration the largest possible liberty of deciding for themselves in what manner and under what conditions they preferred to avail themselves of its good offices. The twentieth article of the Convention says:

> "With the object of facilitating the immediate recourse to arbitration for international differences which could not be settled by diplomatic methods, the Signatory Powers undertake to organize a permanent court of arbitration, accessible at all times, and acting, *unless otherwise stipulated by the parties*, in accordance with the rules of procedure included in the present Convention."

As if this invitation to the parties to prescribe such regulations as they desired was not sufficient, they repeated the invitation with great explicitness at the beginning of the thirtieth article on the subject of arbitral procedure, in these words:

"With a view to encouraging the development of arbitration, the Signatory Powers have agreed upon the following rules which shall be applicable to the arbitral procedure, *unless the parties have agreed upon different regulations.*"

It is in this way that international arbitration is made attractive; for the place, the judges, and the terms and conditions for the hearing of any controversy are thus left to the decision of the interested parties.

It happened that the parties to the first arbitration, which has been already mentioned, did not avail themselves of their right to designate the language to be used; and the distinguished judges who sat in that case united in earnestly advising that, in all future protocols, the language to be used should be explicitly stated. They said:

"The undersigned deem it necessary to bring the attention of the governments in litigation to the necessity of arriving at an agreement beforehand with regard to the language they may desire the discussion before the court to take place in. It is absolutely necessary that the point be made clear prior to the commencement of the labors of the tribunal, in order that the selection of the agents and counsel may be made with a view to their knowledge of the language in which the pleadings before the arbitrators are to be made. The necessity for translating for the use of counsel the speeches made before the tribunal inevitably provokes a great loss of time. In view of these observations, it is desirable that the choice of the agents and counsel before the arbitral tribunal be made in conformity with the wishes of the powers in litigation as to the language to be used before the tribunal, and they therefore recommend that all future agreements for arbitration shall state the desire or decision of the contracting powers in this regard."

This recommendation omitted, however, one of the most important considerations with reference to fixing the language to be used, and that is, that not only the agents and counsel, but the judges who are to hear and decide the controversy, should also be selected with express reference to their familiarity with the language selected by the parties to the arbitration.

The first question, therefore, alike in order of time and of importance, to be thus decided by the parties is the question of the language to be used in the proceedings; for, until that is settled, the judges cannot be intelligently selected, nor can the agents and counsel be intelligently appointed, nor, indeed, can any effective steps in the way of preparation be taken.

In the Venezuelan protocols all the parties to them agreed that the English language should be used; but, with a generosity which the result showed to be unwise, it was provided that counsel might address the tribunal in any other language; and an effort was at once made to substitute the French language as the principal language of the proceedings. This effort was prolonged and not without some incidents which might have proved of serious consequence. One such consequence might have been a majority of judges not sufficiently familiar with the English language; for, in that case, it would have been virtually impossible for the agents and counsel of the four principal parties to the controversy to have adequately discharged the duty confided to them by their respective governments. Indeed, at one time serious apprehension was felt that such a situation might result from the omission in the protocols of any explicit requirement that the judges to be appointed should be familiar with the English language. This omission was, of course, due to the belief that, as the English language was to be employed, no such requirement was necessary. It was, however, very natural that the dispute should arise, and that diplomatists should lend whatever influence they possessed in the matter in favor of the French language; for, although the English language is now used by more than three times as many inhabitants of the globe as use the French language, and the use of the English language is increasing at a very rapid rate, while the use of the French language is comparatively stationary, French still is, and will probably long continue to be, the preferable language in diplomacy. The final decision was, however, in favor of using English as the principal, and French only as the subsidiary, language in the proceedings.

In the Venezuelan protocols, it was also agreed that "the facts on which shall depend the decision of the questions stated in Article first shall be ascertained in such manner as the tribunal may determine." Experience has shown that, in this respect also, it would be wiser, in future protocols, to set forth distinctly the order of procedure—as, for instance, that the preliminary examinations and printed proofs which the parties desire in the first instance to submit, should be delivered to the judges, and exchanged between the agents and counsel, through the Secretary-General at The Hague, on or before a day stipulated in the agreement, and that some subsequent day should be named for the delivery and

exchange, through the same agency, of any counter-statements and additional proofs which either party might wish to offer. The agreement ought then to fix a day and place for the assembling of the tribunal, to be changed only with the assent of all the parties. Such a method of procedure would enable the judges, as well as the respective agents and counsel, to assemble at the place and on the day fixed in the agreement for the meeting of the tribunal, with minds familiar with the contentions of the parties, and the proofs upon which they rely to support these contentions. With such provisions, no great delay need occur after the tribunal assembles before proceeding with the oral arguments.

It was, of course, impossible to foresee the desirableness of such provisions when the protocols for the Venezuelan arbitration were prepared, for it is only experience which could teach such desirableness; but the experience in that case, it is believed, was quite sufficient to justify the suggestions which have been made. Those agreements or protocols were signed May 7th, 1903, and on the next day Venezuela presented her respectful request to the Emperor of Russia to appoint the arbitrators. Unhappily, however, Great Britain and Germany, as no time was named for the discharge of such duty, delayed joining in that request; and, although their attention was called in the month of July to the desirableness of their doing so, it is supposed that they only made such request on August 25th, less than a week before September first, the day on which the tribunal was required to assemble. Unhappily, also, two of the jurists first named by the Emperor of Russia were misled into supposing that they were not eligible, and the Emperor was, therefore, required to find alternates for them, which he was quite unable to do before the time for the court to assemble had passed.

The failure to secure the assembling of the tribunal on the day upon which it was required to meet, and with a majority of English-speaking judges, was naturally a cause of very great anxiety. That anxiety may well have been excessive, but it was due in large degree to the disquieting telegrams continually arriving in Europe from South America. Those telegrams described the growth of very bitter feeling in Venezuela towards all foreigners, and especially towards the Mixed Commissions then sitting at Caracas to adjudicate the claims against Venezuela preferred by foreigners. Those telegrams were of such a character as to create

a fear that President Castro might avail himself of the failure, for over three months, of Great Britain and Germany to join in Venezuela's request to the Emperor of Russia to appoint the arbitrators, thus preventing the tribunal from meeting on the day stipulated for its meeting, to declare the arbitration to have been abandoned by them. Such a declaration on his part, while probably within his technical right, would certainly have been productive of very great embarrassment, not only to the allied Powers, but also to the government of the United States, and would have opened up some very grave questions which it is far better, both for Europe and America, to postpone to some happier season, besides being a most serious blow to the cause of international arbitration. As a result of this delay, the only arbitrator who appeared at The Hague on the day appointed for the meeting of the tribunal was M. Mouravieff, of Russia, who did not speak English; and the anxiety that at least a majority of the judges should be familiar with the English language was due to the fact — that not only the United States and Venezuela, but Great Britain and Germany as well, relying upon the provision of the protocols that the English language should be employed, had made all their preparations, both in the printing of their briefs and proofs, and in the employment of their agents and counsel, in the belief that that language would be employed. If, therefore, we were confronted with a majority of judges unable to fully understand the oral arguments it was our duty to address to them, a failure of the arbitration, or at least a postponement of it, would have been inevitable. In the anxiety thus existing, various devices suggested themselves for hastening the assembling of the tribunal, with a majority of English-speaking judges, before Venezuela showed any disposition to withdraw from it; and constant efforts were made to secure that result, although for some time without any appearance of success. Indeed, by the middle of September, it seemed improbable that a majority of English-speaking judges would be secured; and, even if they should be secured, the time of procuring them might be prolonged until the patience of President Castro was exhausted. It was, of course, quite possible to exaggerate the danger of an abandonment or postponement of the arbitration from either of the causes mentioned; but, judging the situation from the facts then known, it was felt that no action ought to be omitted which

could help in the slightest degree to secure the meeting of the tribunal, with a majority of English-speaking judges, at the earliest possible moment. Applications and alternative suggestions were therefore made; and the assistance of everybody was invoked, who, it was thought, could hasten the appointment of such judges, and their assembling at The Hague; and such appeals were continued in every quarter where it was thought they might possibly bear good fruit.

There was also always present the sense that the treatment of this matter of time had not been such as the governments of the United States and Venezuela were entitled to expect; and that for the agent and counsel for those two countries to sit at The Hague in idleness, day after day, with no certainty of compliance with either the letter or the spirit of the protocols, and with even less certainty as to the time when compliance might be expected, was hardly compatible with the dignity of either nation, and, possibly, not altogether compatible with the dignity of the agent and counsel themselves. Venezuela had promptly discharged every obligation she had assumed; and her agent and counsel, who were the same as those of the United States, had travelled long distances and appeared at The Hague in ample time before the date agreed upon for the assembling of the tribunal, fully prepared to begin at once the discharge of the duties entrusted to them; and there they were obliged to sit in idleness and uncertainty an entire month. But if the suggestions hereinbefore made are followed in future, no such trying experience will be again encountered.

The moment, however, that October first was definitely fixed for the organization of the tribunal, and it was known that a majority of the judges would possess sufficient familiarity with the English language to enable the arbitration to proceed without further delay, all difficulties disappeared.

The foregoing statements show how attractive international arbitration has become by the institution of the Permanent Tribunal at The Hague:

In the first place, because the tribunal need not sit at The Hague, if the parties, with the consent of the judges they select, prefer it to sit elsewhere:

In the second place, because, from the great number of distinguished judges, it is easy for the nations in controversy to select such number of impartial jurists as they may desire:

In the third place, because, by provisions in their agreements, they may confine the proceedings to such language as they prefer, and they can easily take the precaution of securing judges perfectly familiar with the language for which they declare:

In the fourth place, because they can specifically provide within what period the preliminary examinations and printed proofs are to be delivered and exchanged, and within what later period the counter-cases and additional printed proofs are also to be delivered and exchanged:

And in the fifth place, because they can clearly designate the date on which the tribunal is to assemble; and, all the judges and counsel on both sides having been previously supplied with the documents upon which the controversy is to turn, there need be no great delay in proceeding with the oral arguments.

By proper regard to these considerations, all the persons charged with the conduct of future international arbitrations can readily avoid all difficulties and delays, and the controversy can proceed in an orderly and satisfactory manner from beginning to end.

Happily, all our past history helps to make such peaceful adjustments of controversies with other nations exceptionally attractive for us. We ought not, perhaps, to take too much to heart the flattering words which Madame de Staël spoke to Mr. George Ticknor at their last meeting: "You are the advance guard of the human race. You have the future of the world." Indeed, it may well be that our good opinion of ourselves needs no encouragement; but, whether true in all respects or not, those words are signally true of our advocacy of the noble cause of international arbitration. In that regard, we may fairly claim to have justified Madame de Staël's ardent eulogy; for, as soon as our country took its place in the family of nations, we became an example as well as an advocate of that good cause, and we have continued such example and advocacy from that day until the present. More than fifty years ago, we made a treaty with a sister American republic, far weaker than we were, in which are found these impressive words:

"If, unhappily, any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments in the name of those nations do promise

to each other that they will endeavor in the most sincere and earnest manner to settle the differences so arising, and to preserve the state of peace and friendship between the two countries, using for this end mutual representations and pacific negotiations; and if by these means they should not be enabled to come to an agreement, a resort shall not be had to reprisals, aggression or hostility of any kind by the one republic against the other, until the government of that which feels itself aggrieved shall have maturely considered, in the spirit of peace and good neighborhood, whether it would not be better that such difference should be settled by the arbitration of Commissioners appointed on each side, or by that of a friendly nation."

And more than fifty years thereafter, at the first international American Congress, convened upon our invitation at the city of Washington in 1890, it was declared:

"We do solemnly recommend all the governments by which we are accredited to conclude a uniform treaty of arbitration, as a principle of American international law, for the settlement of the differences, disputes or controversies that may arise between two or more of them."

And they added, with equal solemnity, these words, which should never be forgotten:

"Arbitration shall be *obligatory* in all controversies concerning diplomatic and consular privileges, boundaries, territory, indemnities, the right of navigation, and the validity, construction and enforcement of treaties; *and the sole question which any nation is at liberty to refuse to arbitrate is a question which may imperil its independence.*"

Mr. Blaine, who was well known as an ardent friend of peace among all the republics on the American continent, declared:

"If in this closing hour the Conference had but one deed to celebrate, we should dare to call the world's attention to the deliberate, confident, solemn dedication of this continent to peace and to the prosperity which has peace for its foundation. We hold up this new Magna Charta, which abolishes war and substitutes arbitration between the American republics, as the first and great fruit of the International American Conference."

Secretary Hay very recently stated our policy in respect to international arbitration in these clear and emphatic words:

"Advocating and adhering in practice, in questions concerning itself, to the resort of international arbitration in the settlement of controversies not adjustable by the orderly treatment of diplomatic negotiations, the government of the United States would always be glad to see the question of the justice of the claims by one state against another, growing out of individual or national obligations, left to the decision of an

impartial arbitral tribunal, before which litigating nations, *weak and strong alike,* may stand as equals in the eye of international law and mutual duty."

Our long advocacy of this ethical doctrine, during every year of our national existence, finds practical exemplification in the fact that, during the nineteenth century, the government of the United States entered into forty-nine separate agreements for such arbitration with twenty different nations; and President Roosevelt in his message to Congress of December 7th, 1903, declared that as "the Hague Tribunal offers in the Venezuelan Arbitration so good an example of what can be done in the pacific settlement of controversies between nations, recourse to it ought to be encouraged in every way." Our record is, therefore, in this matter equally creditable and consistent from 1787 to 1903.

The purpose of this article is to call attention to the fact, that the way is now more open than ever before for any two nations having a controversy which they cannot adjust by diplomatic negotiations, to submit such controversy to the tribunal established by the Peace Conference of 1899; and no country ought to feel too strong, or be too wilful, to agree to such submission, especially where its opponent is a small or weak nation; for the invitation to that Conference proceeded from the ruler of the greatest military power on earth, a ruler who is absolutely free from constitutional limitations upon his actions, alike in peace and war.

It is therefore to be hoped that recourse to international arbitration, now made so feasible and so attractive, will grow in favor with every passing year; and, certainly, no American statesman ought ever to forget these memorable words of General Grant: "Though I have been trained as a soldier and have participated in many battles, there never was a time when, in my opinion, some way could not have been found of preventing the drawing of the sword. I look forward to an epoch when a court recognized by all nations will settle international difficulties." The epoch to which this great soldier and patriot looked forward is now here, and the court he hoped for is realized in the Hague Tribunal.

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